

**STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY**

In the Matter of Remedial Action by:

BNSF Railway Company
Former Maintenance and Fueling Facility
Skykomish, Washington

AGREED ORDER

No. DE 3279

TO: BNSF Railway Company
Law Department
P.O. Box 961039
2500 Lou Menke Drive, 3rd Floor
Fort Worth, Texas 76131-2828

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I. INTRODUCTION

The mutual objective of the State of Washington, Department of Ecology (Ecology) and BNSF Railway Company (BNSF) under this Agreed Order (Order) is to provide for remedial action at a facility where there has been a release or threatened release of hazardous substances. The facility is the BNSF Former Maintenance and Fueling Facility (Site) in Skykomish, Washington. This Order requires BNSF to perform an interim action to remediate the soils, groundwater, surface water and sediments at specific areas of the South Fork Skykomish River, the flood levee on the south bank of the river, and adjacent upland properties. The adjacent upland properties include 5 residences, West River Road and Sixth Avenue, and a limited area under property owned by the Skykomish School District. Exhibit A shows the general extent of contamination at the Site. Exhibit B shows the area to be remediated under this Order. Ecology believes the actions required by this Order are in the public interest.

Agreed Order Nos. DE91TC-N213 and DE01TCPNR2800 are hereby deemed satisfied by Ecology, except for payment of outstanding oversight costs, as required by these orders and which Ecology has incurred before the effective date of this Order. All other outstanding obligations under Agreed Orders DE91TC-N213 and DE01TCPNR2800 are incorporated by reference into this Order pursuant to Section VII.5 (Work to Be Performed).

II. JURISDICTION

This Agreed Order is issued pursuant to the authority of the Model Toxics Control Act (MTCA), RCW 70.105D.050(1).

III. PARTIES BOUND

This Agreed Order shall apply to and be binding upon the Parties to this Order, their successors and assigns. The undersigned representative of each Party hereby certifies that he or

she is fully authorized to enter into this Order and to execute and legally bind such Party to comply with the Order. BNSF agrees to undertake all actions required by the terms and conditions of this Order. No change in ownership or corporate status shall alter BNSF's responsibility under this Order. BNSF shall provide a copy of this Order to all agents, contractors, and subcontractors retained to perform work required by this Order, and shall ensure that all work undertaken by such agents, contractors, and subcontractors complies with this Order.

IV. DEFINITIONS

Unless otherwise specified herein, the definitions set forth in Chapter 70.105D RCW and Chapter 173-340 WAC shall control the meanings of the terms used in this Order.

1. Site: The Site is generally located in Skykomish, Washington, and is referred to as the BNSF Former Maintenance and Fueling Facility or the BNSF Skykomish Site. The Site is defined by the extent of contamination caused by the release of hazardous substances at the Site. The Site is more particularly described in Exhibit A to this Order, which includes a detailed Site diagram. The Site constitutes a Facility under RCW 70.105D.020(4).
2. Parties: Refers to the State of Washington, Department of Ecology and the BNSF Railway Company (BNSF).
3. Potentially Liable Person (PLP): Refers to the BNSF Railway Company (BNSF).
4. Agreed Order or Order: Refers to this Order and each of the exhibits to the Order. All exhibits are integral and enforceable parts of this Order. The terms "Agreed Order" or "Order" shall include all exhibits to the Order.

V. FINDINGS OF FACT

Ecology makes the following findings of fact, without any express or implied admissions of such facts by BNSF:

1. BNSF is the current owner and operator of approximately 30 acres of real property located south of and adjacent to railroad Avenue in Skykomish, WA. BNSF owned and operated a maintenance and refueling facility on this property that was at various times referred to as "the BNSF Skykomish Former Maintenance and Fueling Facility," "the Burlington

Northern Rail Yard” or “the Burlington Northern Railway Company Former Maintenance and Fueling Facility.” The property owned and operated by BNSF in Skykomish will be referred to as “the railroad facility” in the Facts section of this Order to avoid confusing the term with the Site, which includes properties not owned by BNSF.

2. Great Northern Railroad owned and operated the railroad facility until 1970 when Great Northern Railroad merged with four other railroad companies to become the Burlington Northern Railroad.

3. In 1996 The Burlington Northern Railroad purchased the Atchison, Topeka and Santa Fe Railroad and changed its corporate name to The Burlington Northern and Santa Fe Railway Company.

4. In 2005, The Burlington Northern and Santa Fe Railway Company changed its corporate name to BNSF Railway Company.

5. The railroad facility was used to refuel and maintain locomotives from the late 1800s until those operations were discontinued in 1974. During different periods of the 75 years of operation, coal, bunker oil, electricity and diesel fuel were used to power locomotives. Final Feasibility Study Former Maintenance and Fueling Facility Skykomish, Washington, The RETEC Group, March 15, 2005.

6. From 1974 to the present, the railroad facility has been used as a base of operations for track maintenance and snow removal crews. Id.

7. Petroleum products have been detected in the soil, sediments, air, surface water and groundwater at the Site. PCBs, lead, petroleum products and arsenic have been detected in isolated areas of the Site surface soils. The presence of petroleum and petroleum products, lead, arsenic and PCBs was documented in reports prepared by BNSF’s contractors, including: Remedial Investigation for the Former Maintenance and Fueling Facility in Skykomish, Washington, January 1996; Supplemental Remedial Investigation Volumes 1 and 2 BNSF Former Maintenance and Fueling Facility, Skykomish, Washington, July 2002; and, Final Feasibility Study Former Maintenance and Fueling Facility Skykomish, Washington, March 15, 2005. BNSF developed the Remedial Investigation, Supplemental Remedial Investigation and

Feasibility Study under Agreed Order DE 91TC-N213 to characterize the nature and extent of contamination and to develop remedial alternatives for conducting a Site cleanup. These documents were accepted by Ecology on August 11, 2005 as containing information adequate to develop a cleanup action plan for the Site.

8. Free petroleum product (also known as Light Non-aqueous Phase Liquid or “LNAPL,” as defined in WAC 173-340-200 under the term “NAPL”) is present in soil and in groundwater across most of the Site. Dissolved petroleum product is present in groundwater. Free petroleum product and petroleum dissolved in groundwater are seeping into the Skykomish River. See Exhibit A.

9. Lab results and modeling indicate that free petroleum product and dissolved petroleum have caused adverse impacts, including mortality in sediment benthic organisms (forming the basis of the aquatic food chain), living in the South Fork Skykomish River.

10. BNSF is currently performing interim actions aimed at limiting the potential for inhalation of dust that may contain heavy metals such as lead or arsenic. Under Agreed Order DE91TC-N213, BNSF annually applies dust suppression chemicals on portions of the railroad facility.

11. BNSF is currently performing interim actions aimed at reducing the seepage of petroleum into the Skykomish River. Under Agreed Order DE91TC-N213 BNSF has installed and maintained oil recovery booms in the Skykomish River and oil recovery wells south of the levee on the south bank of the river. Under Agreed Order DE 01TCPNR-2800, BNSF has installed a barrier wall and enhanced the recovery well system to intercept and recover petroleum upgradient from the barrier wall on the south bank of the Skykomish River. Despite these efforts to reduce or eliminate seepage, petroleum free product and contaminated groundwater continue to seep into the Skykomish River.

12. The Site includes a number of residential, commercial and municipal properties that are impacted by contamination that has migrated, and continues to migrate, through groundwater and subsurface soils from the railyard facility to the Skykomish River. Some of these properties

are also impacted on the surface by lead and/or arsenic. Five of the impacted properties are included in the area to be remediated under this Order, as described in Exhibit C.

13. Ecology is the Lead Agency for purposes of complying with the State Environmental Policy Act (SEPA), Chapter 43.21C RCW. Ecology issued a Determination of Significance for the interim action proposed under this Order on January 12, 2006 and accepted public and agency comment through February 3, 2006. The RETEC Group, working for BNSF, prepared a draft Environmental Impact Statement (DEIS) for the Lead Agency evaluating the proposed interim action. The DEIS was issued for public and agency review and comment concurrent with the public review draft of this Order. Ecology issued a Final EIS (FEIS) for this interim action on April 27, 2006. Ecology will publish additional environmental documents pursuant to SEPA prior to selecting any other cleanup actions for this Site.

VI. ECOLOGY DETERMINATIONS

1. BNSF is an "owner or operator" as defined in RCW 70.105D.020(12), of a "facility" as defined in RCW 70.105D.020(4) because BNSF is the owner of real property located in Skykomish, Washington, and BNSF owned and operated a railyard facility on this property as described above.

2. Based upon all factors known to Ecology, a "release" or "threatened release" of "hazardous substance(s)" as defined in RCW 70.105D.020(20) and RCW 70.105D.020(7), respectively, has occurred at the Site.

3. Based upon credible evidence, Ecology issued a potentially liable person status letter to BNSF dated May 29, 1989, pursuant to RCW 70.105D.040, -.020(16) and WAC 173-340-500. After providing for notice and opportunity for comment, reviewing any comments submitted, and concluding that credible evidence supported a finding of potential liability, Ecology issued a determination that BNSF is a potentially liable person (PLP) under RCW 70.105D.040 and notified BNSF of this determination by letter dated July 11, 1989.

4. Pursuant to RCW 70.105D.030(1) and -.050(1), Ecology may require PLPs to investigate or conduct other remedial actions with respect to any release or threatened release of

hazardous substances, whenever it believes such action to be in the public interest. Based on the foregoing facts, Ecology believes the remedial actions required by this Order are in the public interest.

5. Under WAC 173-340-430, an interim action is a remedial action that is technically necessary to reduce a threat to human health or the environment by eliminating or substantially reducing one or more pathways for exposure to a hazardous substance, that corrects a problem that may become substantially worse or cost substantially more to address if the remedial action is delayed, or that is needed to provide for completion of a site hazard assessment, remedial investigation/feasibility study or design of a cleanup action. Petroleum, both as free product and dissolved in groundwater, is discharging into the South Fork of the Skykomish River underneath and through a flood levee on the south bank of the river. Despite interim actions already conducted that were intended to reduce or eliminate seepage, continuing seepage and associated impacts still continue. The impacted area of the South Fork of the Skykomish River is a critical habitat for endangered fish species including salmonids and bull trout. Warning signs are currently posted to alert people to avoid the area where petroleum seeps occur along the river bank. Such circumstances warrant interim action consistent with WAC 173-340-430.

VII. WORK TO BE PERFORMED

Based on the Findings of Fact and Ecology Determinations, it is hereby ordered that BNSF take the following remedial actions at the Site and that these actions be conducted in accordance with Chapter 173-340 WAC unless otherwise specifically provided for herein:

1. BNSF shall perform an interim action to remediate the soils, groundwater, surface water and sediments at specific areas of the South Fork Skykomish River, the flood levee on the south bank of the river, and adjacent upland properties, by implementing the actions outlined in the “Engineering Design Report – Levee Zone Interim Action for Cleanup” (EDR), Exhibit C. As outlined in the EDR, the adjacent upland properties include all or portions of the following King County tax parcels: 7807800705 and 7807800706 (Michael P. Moore); 7807800750 (Richard and Roberta Mitchell); 7807800707 (Robert and Charlotte Mackner); 7807800720,

7807800740 and 2626119018 (Town of Skykomish); and, 5060800005 (Skykomish School District No. 404).

2. The temporary relocation of some residents will be necessary for BNSF to fully implement the interim action as described in the EDR. Exhibit D outlines the guidelines that BNSF will follow in conducting any resident relocations. Consistent with Section VIII.F. of this Order (Access), BNSF shall use best efforts to negotiate in good faith with property owners for access necessary to complete the work required by this Order, including the temporary relocation of residents as necessary. BNSF will confer and cooperate with Ecology on its efforts to negotiate with property owners for access, and shall submit to Ecology copies of the access and temporary relocation provisions of any access agreements obtained. If all access agreements necessary to fully implement the interim action have not been obtained by BNSF by May 15, 2006, BNSF will submit to Ecology by May 15, 2006, for Ecology's review and approval, a work plan for implementing the interim action to the degree possible without access to the property(ies) in question. Upon Ecology's approval, the work plan will become an integral and enforceable part of this Order and BNSF shall implement the work plan pursuant to this Order.

3. The work described in the EDR will be implemented according to the schedule contained in Exhibit E, Construction Schedule. The Construction Schedule indicates when work must begin, specifies deliverables which must be submitted to Ecology and their due dates, and when work must be completed.

4. Weekly Progress Reports - Written weekly progress reports shall be submitted to Ecology that describe the remedial actions taken by BNSF under this Order during the previous week to implement the actions described in Exhibit C, Engineering Design Report. All progress reports shall be delivered by the first business day of each week until the remedial actions set forth in Exhibit C have been constructed and residents have been returned to their homes.

Thereafter, BNSF will submit monthly progress reports on the 15th day of each month until this

Order is terminated or deemed satisfied by Ecology pursuant to Section IX. The reports shall include but not be limited to the following items:

- a.) A list of activities that have taken place during the reporting period;
- b.) Detailed description of any deviations from the Order and project plans;
and
- c.) Description of all deviations from the schedule and any planned deviations in the upcoming reporting period, and plans for recovering lost time and maintaining compliance with the schedule.

5. BNSF shall continue groundwater monitoring as described in the *Groundwater Monitoring Plan* dated May 12, 2005 (GW Plan), as a requirement of this Order. Some of the wells that BNSF is currently monitoring will be removed as part of the work described in the EDR. No later than January 15, 2007, BNSF will submit to Ecology for review and approval proposed revisions to the GW Plan, which include groundwater compliance monitoring consistent with WAC 173-340-410. If after review and comment on one draft Ecology determines that insufficient progress is being made in the preparation of revisions to the GW Plan, then Ecology may complete and issue the final revised GW Plan. If observations subsequent to performing the interim action indicate seeps are occurring, oil recovery booms shall be installed in the river and maintained as described in the *Boom Maintenance Technical Memorandum* dated August 30, 2002, as a requirement of this Order. BNSF will continue to apply dust suppression chemicals on portions of the railroad facility each Spring, and as necessary in summer, as a requirement of this Order.

VIII. TERMS AND CONDITIONS OF ORDER

A. Public Notices

RCW 70.105D.030(2)(a) requires that, at a minimum, this Order be subject to concurrent public notice. Ecology shall be responsible for providing such public notice and reserves the right to withdraw this Order should public or agency comment disclose facts or considerations

which indicate to Ecology that the Order is inadequate or improper in any respect. In the event Ecology withdraws this Order, Ecology and BNSF agree to negotiate in good faith to modify this Order and submit it for additional public and agency review and comment.

B. Remedial Action Costs

BNSF shall pay to Ecology costs incurred by Ecology pursuant to this Order and consistent with WAC 173-340-550(2). These costs shall include work performed by Ecology or its contractors for, or on, the Site under Chapter 70.105D RCW, including Order preparation, negotiation, oversight, and administration related to this Order. These costs shall include work performed both prior to and subsequent to the issuance of the Order. BNSF shall pay the required amount within ninety (90) days of receiving from Ecology an itemized statement of costs that includes a summary of costs incurred, an identification of involved staff, and the amount of time spent by involved staff members on the project. A general description statement of work performed will be provided upon request. Itemized statements shall be prepared quarterly. Pursuant to WAC 173-340-550(4), failure to pay Ecology's costs within ninety (90) days of receipt of the itemized statement of costs will result in interest charges at the rate of twelve percent (12%) per annum, compounded monthly.

C. Implementation of Remedial Action

Except where necessary to abate an emergency situation, BNSF shall not perform any remedial actions at the Site outside those remedial actions required by this Order, unless Ecology concurs, in writing, with such additional remedial actions.

D. Designated Project Coordinators

The project coordinator for Ecology is:

Louise Bardy
Washington State Department of Ecology
3190 160th Avenue Southeast
Bellevue, WA 98008-5452
Telephone: (425) 649-7209
E-Mail: LBAR461@ECY.WA.GOV

The project coordinator for BNSF is:

Bruce Sheppard

BNSF Railway Company
2454 Occidental Avenue South
Suite 1A
Seattle, WA 98134
Telephone: (206) 625-6053
E-Mail: Bruce.Sheppard@BNSF.COM

The project coordinator(s) shall be responsible for overseeing the implementation of this Order. The Ecology project coordinator will be Ecology's designated representative for the Site. To the maximum extent possible, communications between Ecology and BNSF, and all documents, including reports, approvals, and other correspondence concerning the activities performed pursuant to the terms and conditions of this Order shall be directed through the project coordinator(s).

Ecology and BNSF may change their respective project coordinator, but must provide ten (10) days advance written notification of the change to the other party.

E. Performance

All work performed pursuant to this Order shall be under the direction and supervision, as necessary, of a licensed professional engineer or licensed hydrogeologist, or equivalent as approved by Ecology, with experience and expertise in hazardous waste site investigation and cleanup. BNSF shall notify Ecology in writing of the identity of such engineer(s), or hydrogeologist(s), or others, and of any contractors and subcontractors to be used in carrying out the terms of this Order, in advance of their involvement at the Site.

Any construction work performed pursuant to the Order shall be under the supervision of a professional engineer or a qualified technician under the direct supervision of a professional engineer. The professional engineer must be registered in the State of Washington, except as provided in RCW 18.43.130.

F. Access

Ecology or any Ecology authorized representative shall have the full authority to enter and freely move about all property at the Site that BNSF either owns, controls, or has access rights to at all reasonable times for the purposes of, *inter alia*: inspecting records, operation logs,

and contracts related to the work being performed pursuant to this Order; reviewing BNSF's progress in carrying out the terms of this Order; conducting such tests or collecting such samples as Ecology may deem necessary; using a camera, sound recording, or other documentary type equipment to record work done pursuant to this Order; and verifying the data submitted to Ecology by BNSF. BNSF shall make all reasonable efforts to secure access rights for those properties within the Site not owned or controlled by BNSF where remedial activities or investigations will be performed pursuant to this Order. Ecology or any Ecology authorized representative shall give reasonable notice before entering any Site property owned or controlled by BNSF unless an emergency prevents such notice. All persons who access the Site pursuant to this paragraph shall comply with the approved health and safety plan, if any. Ecology employees and their representative shall not be required to sign any release or waiver as a condition of Site property access.

G. Sampling, Data Submittal, and Availability

With respect to the implementation of this Order, BNSF shall make the results of all sampling, laboratory reports, and/or test results generated by it or on its behalf available to Ecology. Pursuant to WAC 173-340-840(5), all sampling data shall be submitted to Ecology in both printed and electronic formats in accordance with Section VII (Work to be Performed), Ecology's Toxics Cleanup Program Policy 840 (Data Submittal Requirements), and/or any subsequent procedures specified by Ecology for data submittal.

If requested by Ecology, BNSF shall allow split or duplicate samples to be taken by Ecology and/or its authorized representative of any samples collected by BNSF pursuant to implementation of this Order. BNSF shall notify Ecology seven (7) days in advance of any sample collection or work activity at the Site. Ecology shall, upon request, allow split or duplicate samples of any samples collected by Ecology pursuant to the implementation of this Order to be taken by BNSF or its authorized representative provided it does not interfere with Ecology's sampling. Without limitation on Ecology's rights under Section VIII.F. of this Order, Ecology shall notify BNSF prior to any sample collection activity unless an emergency prevents such notice.

In accordance with WAC 173-340-830(2)(a), all hazardous substance analyses shall be conducted by a laboratory accredited under Chapter 173-50 WAC for the specific analyses to be conducted, unless otherwise approved by Ecology.

H. Public Participation

The Public Participation Plan for this Interim Action is attached as Exhibit F. Ecology shall maintain the responsibility for public participation at the Site. However, BNSF shall cooperate with Ecology to implement the public participation plan, including:

1. If agreed to by Ecology, develop appropriate mailing list, prepare drafts of public notices and fact sheets at important stages of the remedial action, such as the submission of work plans, remedial investigation/feasibility study reports, cleanup action plans, and engineering design reports. As appropriate, Ecology will edit, finalize, and distribute such fact sheets and prepare and distribute public notices of Ecology's presentations and meetings;

2. Notify Ecology prior to any of the following: the issuance of all press releases; distribution of fact sheets; performance of other outreach activities; meetings with the interested public and/or local governments. Likewise, Ecology shall notify BNSF prior to the issuance of all press releases and fact sheets, and before meetings with the interested public and local governments. For all press releases, fact sheets, meetings, and other outreach efforts by BNSF that do not receive prior Ecology approval, BNSF shall clearly indicate to its audience that the press release, fact sheet, meeting, or other outreach effort was not sponsored or endorsed by Ecology;

3. When requested by Ecology, participate in public presentations on the progress of the remedial action at the Site. Participation may be through attendance at public meetings to assist in answering questions, or as a presenter;

4. When requested by Ecology, arrange and/or continue information repositories to be located at the following locations:

- (a) Skykomish Library
100 Fifth Street
Skykomish, Washington 98288

(360) 677-2660

(b) Ecology's Northwest Regional Office

3190 160th Avenue SE

Bellevue, Washington 98008

(425) 649-7000

At a minimum, copies of all public notices, fact sheets, and press releases; all quality assured monitoring data; remedial action plans and reports, supplemental remedial planning documents, and all other similar documents relating to performance of the remedial action required by this Order shall be promptly placed in these repositories.

I. Retention of Records

During the pendency of this Order and for ten (10) years from the date of completion of work performed pursuant to this Order, BNSF shall preserve all records, reports, documents, and underlying data in its possession relevant to the implementation of this Order and shall insert a similar record retention requirement into all contracts with project contractors and subcontractors. Upon request of Ecology, BNSF shall make all records available to Ecology and allow access for review within a reasonable time. Nothing in this Order is intended by BNSF to waive any right it may have under applicable law to limit disclosure of documents protected by the attorney work-product privilege and/or attorney-client privilege.

J. Resolution of Disputes

1. In the event a dispute arises as to an approval, disapproval, proposed change, or other decision or action by Ecology's project coordinator, or an itemized billing statement under Section VIII.B (Remedial Action Costs), the Parties shall utilize the dispute resolution procedure set forth below.

(a) Upon receipt of the Ecology project coordinator's decision or the itemized billing statement, BNSF has fourteen (14) days within which to notify Ecology's project coordinator of its objection to the decision or itemized statement.

(b) The Parties' project coordinators shall then confer in an effort to resolve the dispute. If the project coordinators cannot resolve the dispute within fourteen (14) days, Ecology's project coordinator shall issue a written decision.

(c) BNSF may then request Ecology management review of the decision. This request shall be submitted in writing to the Manager of the Land and Aquatics Cleanup Section (Section Manager) at Ecology's Headquarters Office within seven (7) days of receipt of Ecology's project coordinator's decision.

(d) The Section Manager shall conduct a review of the dispute and shall endeavor to issue a written decision regarding the dispute within thirty (30) days of BNSF's request for review. The Section Manager's decision shall be Ecology's final decision on the disputed matter.

2. The Parties agree to only utilize the dispute resolution process in good faith and agree to expedite, to the extent possible, the dispute resolution process whenever it is used.

3. Implementation of these dispute resolution procedures shall not provide a basis for delay of any activities required in this Order, unless Ecology agrees in writing to a schedule extension.

K. Extension of Schedule

1. An extension of schedule shall be granted only when a request for an extension is submitted in a timely fashion, generally at least thirty (30) days prior to expiration of the deadline for which the extension is requested, and good cause exists for granting the extension. All extensions shall be requested in writing. The request shall specify the reason(s) the extension is needed. The request shall specify:

- (a) The deadline that is sought to be extended;
- (b) The length of the extension sought;
- (c) The reason(s) for the extension; and
- (d) Any related deadline or schedule that would be affected if the extension were granted.

2. The burden shall be on BNSF to demonstrate to the satisfaction of Ecology that the request for such extension has been submitted in a timely fashion and that good cause exists for granting the extension. Good cause includes, but is not limited to:

- (a) Circumstances beyond the reasonable control and despite the due diligence of BNSF including delays caused by unrelated third parties or Ecology, such as (but not limited to) delays by Ecology in reviewing, approving, or modifying documents submitted by BNSF; or
- (b) Acts of God, including fire, flood, blizzard, extreme temperatures, storm, or other unavoidable casualty; or
- (c) Endangerment as described in Section VIII.M. of this Order.

However, neither increased costs of performance of the terms of this Order nor changed economic circumstances shall be considered circumstances beyond the reasonable control of BNSF.

3. Ecology shall act upon any written request for extension in a timely fashion. Ecology shall give BNSF written notification in a timely fashion of any extensions granted pursuant to the Order. A requested extension shall not be effective until approved by Ecology. Unless the extension is a substantial change, it shall not be necessary to amend this Order pursuant to Section VIII.L when a schedule extension is granted.

4. An extension shall only be granted for such period of time as Ecology determines is reasonable under the circumstances. Ecology may grant schedule extensions exceeding ninety (90) days only as a result of:

- (a) Delays in the issuance of a necessary permit which was applied for in a timely manner;
- (b) Other circumstances deemed exceptional or extraordinary by Ecology;
- (c) Acts of God, including fire, flood, blizzard, extreme temperatures, storm, or other unavoidable casualty; or
- (d) Endangerment as described in Section VIII.M of this Order.

L. Amendment of Order

The project coordinators may verbally agree to minor changes to the work to be performed without formally amending this Order. Minor changes will be documented in writing by Ecology within seven (7) days of verbal agreement.

Except as provided in Section VIII.N of this Order, substantial changes to the work to be performed shall require formal amendment of this Order. This Order may only be formally amended by the written consent of both Ecology and BNSF. BNSF shall submit a written request for amendment to Ecology for approval. Ecology shall indicate its approval or disapproval in writing and in a timely manner after the written request for amendment is received. If the amendment to the Order represents a substantial change, Ecology will provide additional public notice and opportunity to comment. If Ecology does not agree to a proposed amendment, the disagreement may be addressed through the dispute resolution procedures described in Section VIII.J. of this Order.

M. Endangerment

In the event Ecology determines that any activity being performed at the Site is creating or has the potential to create a danger to human health or the environment on or surrounding the Site, Ecology may direct BNSF to cease such activities for such period of time as it deems necessary to abate the danger. BNSF shall immediately comply with such direction.

If, for any reason, BNSF determines that any activity being performed at the Site is creating or has the potential to create a danger to human health or the environment, BNSF may cease such activities. BNSF shall notify Ecology's project coordinator as soon as possible, but no later than twenty-four (24) hours after making such determination or ceasing such activities. Upon Ecology's direction BNSF shall provide Ecology with documentation of the basis for the determination or cessation of such activities. If Ecology disagrees with BNSF's cessation of activities, it may direct BNSF to resume such activities.

If Ecology concurs with or orders a work stoppage pursuant to this section, BNSF's obligations with respect to the ceased activities shall be suspended until Ecology determines the danger is abated, and the time for performance of such activities, as well as the time for any other

work dependent upon such activities, shall be extended for such period of time as Ecology determines is reasonable under the circumstances.

Nothing in this Order shall limit the authority of Ecology, its employees, agents, or contractors to take or require appropriate action in the event of an emergency.

N. Reservation of Rights

This Order is not a settlement under Chapter 70.105D RCW. Ecology's signature on this Order in no way constitutes a covenant not to sue or a compromise of any Ecology rights or authority. Ecology will not, however, bring an action against BNSF to recover remedial action costs paid to and received by Ecology under this Order. In addition, Ecology will not take additional enforcement actions against BNSF regarding remedial actions required by this Order, provided BNSF complies with this Order.

Ecology nevertheless reserves its rights under Chapter 70.105D RCW, including the right to require additional or different remedial actions at the Site should it deem such actions necessary to protect human health and the environment, and to issue orders requiring such remedial actions. Ecology also reserves all rights regarding the injury to, destruction of, or loss of natural resources resulting from the release or threatened release of hazardous substances at the Site.

O. Transfer of Interest in Property

No voluntary conveyance or relinquishment of title, easement, leasehold, or other interest in any portion of the Site shall be consummated by BNSF without provision for continued implementation of all requirements of this Order and implementation of any remedial actions found to be necessary as a result of this Order.

Prior to BNSF's transfer of any interest in all or any portion of the Site, and during the effective period of this Order, BNSF shall provide a copy of this Order to any prospective purchaser, lessee, transferee, assignee, or other successor in said interest; and, at least thirty (30) days prior to any transfer, BNSF shall notify Ecology of said transfer. Upon transfer of any interest, BNSF shall restrict uses and activities to those consistent with this Order and notify all transferees of the restrictions on the use of the property.

P. Compliance with Applicable Laws

1. All actions carried out by BNSF pursuant to this Order shall be done in accordance with all applicable federal, state, and local requirements, including requirements to obtain necessary permits, except as provided in RCW 70.105D.090. A list of the required permits known at the time of entry of this Order have been included in Exhibit G.

2. Pursuant to RCW 70.105D.090(1), BNSF is exempt from the procedural requirements of Chapters 70.94, 70.95, 70.105, 77.55, 90.48, and 90.58 RCW and of any laws requiring or authorizing local government permits or approvals. However, through this Order BNSF shall comply with the substantive requirements of such permits or approvals. A list of such permits and approvals and/or the substantive requirements of those permits and approvals as they are known to be applicable at the time of entry of this Order, have been included in Exhibit G.

BNSF has a continuing obligation to determine whether additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under this Order. In the event either Ecology or BNSF determines that additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under this Order, it shall promptly notify the other party of its determination. Ecology shall determine whether Ecology or BNSF shall be responsible to contact the appropriate state and/or local agencies. If Ecology so requires, BNSF shall promptly consult with the appropriate state and/or local agencies and provide Ecology with written documentation from those agencies of the substantive requirements those agencies believe are applicable to the remedial action. Ecology shall make the final determination on the additional substantive requirements that must be met by BNSF and on how BNSF must meet those requirements. Ecology shall inform BNSF in writing of these requirements. Once established by Ecology, the additional requirements shall be enforceable requirements of this Order. BNSF shall not begin or continue the remedial action potentially subject to the additional requirements until Ecology makes its final determination.

Ecology shall ensure that notice and opportunity for comment is provided to the public and appropriate agencies prior to establishing the substantive requirements under this section.

3. Pursuant to RCW 70.105D.090(2) in the event Ecology determines that the exemption from complying with the procedural requirements of the laws referenced in RCW 70.105D.090(1) would result in the loss of approval from a federal agency which is necessary for the state to administer any federal law, the exemption shall not apply and BNSF shall comply with both the procedural and substantive requirements of the laws referenced in RCW 70.105D.090(1), including any requirements to obtain permits.

Q. Indemnification

BNSF agrees to indemnify and save and hold the State of Washington, its employees, and agents harmless from any and all claims or causes of action for death or injuries to persons or for loss or damage to property to the extent arising from or on account of acts or omissions of BNSF, its officers, employees, agents, or contractors in entering into and implementing this Order. However, BNSF shall not indemnify the State of Washington nor save nor hold its employees and agents harmless from any claims or causes of action to the extent arising out of the negligent acts or omissions of the State of Washington, or the employees or agents of the State, in entering into or implementing the activities pursuant to this Order.

IX. SATISFACTION OF ORDER

The provisions of this Order shall be deemed satisfied upon BNSF's receipt of written notification from Ecology that BNSF has completed the remedial activity required by this Order, as amended by any modifications, and that the BNSF has complied with all other provisions of this Agreed Order.

X. ENFORCEMENT

Pursuant to RCW 70.105D.050, this Order may be enforced as follows:

1. The Attorney General may bring an action to enforce this Order in a state or federal court.
2. The Attorney General may seek, by filing an action, if necessary, to recover amounts spent by Ecology for remedial actions and orders related to the Site.
3. In the event BNSF refuses, without sufficient cause, to comply with any term of this Order, BNSF will be liable for:

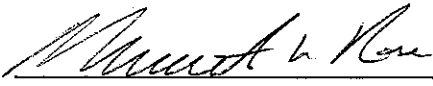
(a) Up to three (3) times the amount of any costs incurred by the State of Washington as a result of its refusal to comply; and

(b) Civil penalties of up to \$25,000 per day for each day it refuses to comply.

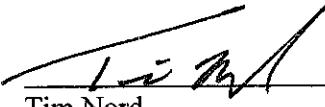
4. This Order is not appealable to the Washington Pollution Control Hearings Board. This Order may be reviewed only as provided under RCW 70.105D.060.

Effective date of this Order:


BNSF RAILWAY COMPANY


Matthew K. Rose
Chief Executive Officer

DEPARTMENT OF ECOLOGY

 5/19/06
Tim Nord
Manager
Land and Aquatics Cleanup Section
Headquarters Office
(360) 407-7226

APPROVED AS TO FORM


SENIOR GENERAL ATTORNEY